No. 94-1707

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

ANGEL YUH WILLIAMSON, M.D., and
PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC, P.A.,
*Petitioners,*

v.

SACRED HEART HOSPITAL OF PENSACOLA, BAPTIST HOSPITAL, INC., PENSACOLA RADIOLOGY CONSULTANTS, P.A., ALBERT A. POST, M.D., KEITH T. SHEARLOCK, M.D., and HEALTH FIRST NETWORK, INC.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether a plaintiff, who has presented no evidence of antitrust injury, has standing to sue under the antitrust laws?

II. In determining whether a plaintiff's antitrust claim should survive summary judgment, may the court determine the economic reasonableness of plaintiff's theory?

## INTERESTED PERSONS

The following persons and entities have or may have an interest in the outcome of this case.

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11. Pensacola Diagnostic & Breast Clinic, P.A.
    (Petitioner)

12. Pensacola Radiology Consultants, P.A.
    (Respondent)

13. Albert A. Post, M.D.
    (Respondent)

14. Sacred Heart Hospital of Pensacola
    (Respondent)

15. Keith T. Shearlock, M.D.
    (Respondent)

16. Angel Yuh Williamson, M.D.
    (Petitioner)

17. Michael Williamson, M.D.
    (spouse of Angel Yuh Williamson)

## STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 29.1, the following information is provided regarding parent, subsidiary and affiliate corporations of each of the Respondents that are incorporated.

1. Sacred Heart Hospital of Pensacola

   a. Daughters of Charity National Health System, Southeast, Inc. is the parent company of Sacred Heart Hospital of Pensacola.

   b. Sacred Heart has two subsidiaries: Sacred Heart Foundation, Inc. and Gulf Coast Diversified, Inc., both of which are wholly-owned subsidiaries of Sacred Heart Hospital of Pensacola.

2. Baptist Hospital, Inc.

   Baptist Healthcare, Inc. is the parent company of Baptist Hospital, Inc.

3. Healthcare First Network, Inc. has no parent, subsidiary, or affiliate corporation.

4. Pensacola Radiology Consultants, P.A. has no parent, subsidiary, or affiliate corporations.

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ANGEL YUH WILLIAMSON, M.D., and
PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC, P.A.,
*Petitioners,*

v.

SACRED HEART HOSPITAL OF PENSACOLA, BAPTIST HOSPITAL, INC., PENSACOLA RADIOLOGY CONSULTANTS, P.A., ALBERT A. POST, M.D., KEITH T. SHEARLOCK, M.D., and HEALTH FIRST NETWORK, INC.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents, Sacred Heart Hospital of Pensacola ("Sacred Heart"), Baptist Hospital, Inc. ("Baptist"), Pensacola Radiology Consultants, P.A. ("PRC"), Albert A. Post, M.D., Keith T. Shearlock, M.D., and Health First Network, Inc. ("Health First") (collectively, the "Respondents"), submit this joint brief in opposition to the petition for a writ of certiorari. Respondents file this joint brief to facilitate the Court's consideration of the matter and because common legal issues are posed.

## STATEMENT OF THE CASE

### I. Proceedings Below

This action was commenced on March 29, 1989, when Petitioners, Angel Williamson and Pensacola Diagnostic Center & Breast Clinic, P.A. (hereinafter "Williamson," the "Clinic," or "Petitioner"),[1] filed a four-count complaint against Respondents alleging federal antitrust violations and state law claims (the "Complaint"). The gravamen of the Complaint is that the Respondents—consisting of two hospitals, an independent physician's association ("IPA"), a radiology group, and various doctors—conspired to prevent Williamson and the Clinic from competing in providing radiology services by the use of exclusive contracts, the denial or limitation of staff privileges, and the alleged manipulation of bylaws, rules and regulations. Williamson claims that as a result of this alleged conspiracy, her application for membership in Health First, the IPA, was denied. (R1-2.) In addition, Petitioner alleges that she suffered antitrust injury by an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged in Counts I, II and III of the Complaint.

After extensive discovery, Respondents moved for summary judgment. The district court's first order, denying the motions for summary judgment of Baptist, Sacred Heart, Health First, and Keith T. Shearlock, M.D., was the result of several inaccurate factual findings, which led the court to erroneous legal conclusions. The factual errors were caused by inaccuracies, misrepresentations, and improper materials in Petitioner's papers.[2] When the errors were made known to the district court, the first

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[1] Because Williamson is the sole owner of the Clinic, they are treated as one Petitioner for the purposes of this brief.

[2] For example, Petitioner relied heavily on affidavits by experts who were never previously identified as required by the federal discovery rules, as well as by the district court's own scheduling order.

order was reconsidered and summary judgment was granted in favor of all Respondents on all counts.

Petitioner then appealed that dismissal to the Court of Appeals for the Eleventh Circuit, reciting the same unsupported claims of conspiracy. After a *de novo* review, the Eleventh Circuit affirmed the district court's granting of summary judgment. The Eleventh Circuit subsequently denied Petitioner's request for rehearing.

The Eleventh Circuit's opinion affirming summary judgment cogently discussed each count of the Complaint, analyzing the Respondents' conduct taken as a whole under the claim of community conspiracy (Count III), and individually under separate conspiracy claims. (Counts I and II.)

## II. Statement of the Facts

### A. *Sacred Heart*

Williamson alleges that the Respondents' conspiracy to eliminate her practice was accomplished by a two-pronged attack on her referral base, namely, the denial of medical staff privileges at Sacred Heart Hospital, which allegedly prevented Williamson from rendering complete care to her patients, and the alleged attack on her physician referral base. With regard to the denial of staff privileges, it is clear that the exclusive contract between Sacred Heart and PRC precluded the grant of privileges to Williamson in the Department of Radiology. Further, Sacred Heart had no economic incentive to "accommodate" Williamson by granting her privileges, inasmuch as the Hospital was committed to opening the Ann Baroco Center, which would be in direct competition with Williamson's clinic. As the district court and the Eleventh Circuit noted, the failure to make special exceptions to established policy to accommodate a competitor is not antitrust behavior. (A135-136; A8.)[3]

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[3] Citations to the Appendix filed by Petitioners are designated as "A ——."

While Williamson contends that Sacred Heart would gain economically from a relationship with her, due to the referral of patients she would provide to the Hospital, the record is undisputed that she neither admitted patients nor provided tangible treatment to patients during "follow-up" visits at other hospitals where she had medical staff membership. (R11-302, App. 1, Tab 3, pp. 1096-1100; A12.)

Williamson contends that Sacred Heart amended its Department of Internal Medicine Rules in an attempt to block her admission to the medical staff. However, the process to amend the rules at issue commenced well before she submitted her first application for staff membership. Further, even under its old bylaws, the Credentialing Committee and the Medical Executive Committee determined she did not meet the minimum requirements for privileges in the Department of Internal Medicine. (R11-302, Whitcomb Affidavit, Exhibit "A", Tab 3.) Williamson's statement that she had the requisite training to satisfy the minimal requirements for privileges in internal medicine is patently false. She unequivocally admitted at the ad hoc hearing that she had not completed one year of clinical training in primary care, the minimum eligibility requirement for privileges. (R11-302, Whitcomb Affidavit, Exhibit "A", Tab 16, pp. 24-34; A84.)

There is absolutely no evidence in the record that any physician associated with PRC played any role in the processing of Williamson's applications. The ultimate credentialing decisions by the Hospital's Board of Directors constituted unilateral actions taken by Sacred Heart's Board of Directors, and do not support a theory of antitrust conspiracy or pretext. (A8-9; A69-70; A137.) Contrary to Williamson's contentions, there is no evidence in the record that Sacred Heart pressured any physicians not to refer patients to Williamson. As noted by the district court, Williamson's allegations of threat and pressure are based almost entirely on her own hearsay testi-

mony describing what other physicians allegedly told her about what Sacred Heart administrators, in turn, told them. (A138.) All physicians who were deposed denied that they were under any pressure to disassociate themselves from Williamson. (A93-100.) Further, contrary to the interferences in the Petition, there is evidence in the record that referrals to Williamson from certain physicians actually increased during the relevant period, and that certain physicians always referred their patients to Williamson. (A96-97.)

Petitioner goes on to assert that Sacred Heart entered into contracts with physicians which required a diversion of referrals. All of the physicians who were parties to these contracts denied that the contracts created any requirement for them to refer patients to Sacred Heart's Radiology Department, or that they were under any pressure to make such referrals. (*See, e.g.*, R11-302, App. II, Tabs 36, 38, 40, 42, 43, 47; A142). Moreover, there is no admissible evidence that PRC or any radiologist encouraged Sacred Heart to enter into the contracts, or urged Sacred Heart to request radiology referrals from the contracting physicians. (A148.)

Williamson also contends that Sacred Heart adopted a "needle placement" policy in furtherance of an alleged conspiracy. However, the record makes it clear that there were numerous quality assurance concerns which were raised regarding this particular procedure which unnecessarily exposed Sacred Heart to civil liability. (R11-302, App. II, Tabs 48, 53.) As both the district court and the court of appeals decisions recognized, there existed a compelling, procompetitive reason for banning the procedure proposed by Williamson: she was outside the scope of Sacred Heart's quality controls. (A10; A146-147.) Thus, Sacred Heart had a legitimate reason for implementing the needle placement policy, and no inference of antitrust conspiracy has been raised. (A10.)

**B. *Baptist***

The critical and undisputed fact with respect to Baptist is that Baptist granted the privileges that Williamson requested. Accordingly, Petitioner's contention that "Dr. Williamson proved the conspiracy below by showing that the defendants undertook parallel actions that made no economic sense in the absence of conspiracy" is wrong. (Petition of Angel Yuh Williamson, M.D. and Pensacola Diagnostic and Breast Clinic, P.A. for Writ of Certiorari (the "Petition") at 10.) Williamson admitted, and the courts below so found, that Baptist granted her the privileges to do what she wanted to do at Baptist. Thus, Baptist's action in granting privileges was different from and independent of Sacred Heart's actions and, therefore, was not evidence of parallel conduct. (R15-354-102.)

Nor is the fact that Baptist granted Williamson supervised privileges, rather than unsupervised privileges, of any moment. As noted above, Williamson was granted the privileges for what she wanted to do at Baptist. Moreover, Baptist explained to her that the interaction of its bylaws requirements and its exclusive contract for radiological services with Radiology Associates [4] would not allow the granting of unsupervised privileges. The Eleventh Circuit found no pretext in such an explanation since Baptist's bylaws predated Williamson's application and because of the express legality of such exclusive contracts.[5] (A11.)

Likewise, with respect to the so-called "attack on referrals," the Eleventh Circuit found that the contracts between Baptist and three other doctors, which Petitioner

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[4] Radiology Associates is not a party to this action, nor has it ever been affiliated with PRC.

[5] Exclusive contracts such as the one between Baptist and Radiology Associates were found to be valid by this Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Accordingly, in the summer of 1984, the Board of Directors of Baptist directed its administration and staff to reduce its long-standing relationship with Radiology Associates to an exclusive written contract. (R10-291, Exhibit "C".)

contended deprived Williamson of referrals, could not be an attack on referrals since the contracts themselves expressly stated that the doctors were not obligated to refer patients to Baptist. (A11.) Moreover, the courts below further found no evidence that anyone from Baptist or Radiology Associates pressured a diversion of referrals away from Williamson and to Baptist. *Id.*

### C. *Health First and Keith T. Shearlock, M.D.*

Petitioner argues that the refusal of Health First to admit Petitioner to membership made no economic sense. Petitioner does not, however, provide an explanation of the reason that Petitioner's application was not accepted.

Petitioner was denied admission to Health First because she did not qualify under the credentialing bylaws and for no other reason. The Health First credentialing bylaw required that physicians such as Williamson, practicing in the Pensacola, Florida, metropolitan area, have unsupervised privileges at one of the participating hospitals in Pensacola—Sacred Heart Hospital or Baptist Hospital. (R10-297-03, pp. 6-7.) The bylaw existed before Williamson ever applied for admission to Health First. (R10-297-26, p. 106.) The bylaw was not adopted or changed to affect Petitioner. Petitioner has never qualified for admission to Health First.

The requirement of unsupervised privileges in its credentialing bylaw enabled Health First, which had no staff of its own, to take advantage of the hospital's credentialing and oversight process. (R10-297-1, pp. 2-3.) An additional purpose of the bylaw was to assure that HMO subscribers in the Pensacola service area and their HMO physicians had access to convenient, local hospital care by physicians known to be competent. (R10-297-26, pp. 34, 38-39.)

Petitioner argues that Health First "did everything it could to keep her out." (Petition at 19.) The fact is

that Health First simply abided by its existing bylaw. Petitioner's argument below was that Health First should have made an accommodation by amending its bylaws to make special provision for her. This would have required Health First similarly to accommodate all applicants, or would have required Health First to abandon its reliance on the hospital's credentialing process and to incur the cost of setting up its own independent criteria for investigation, evaluation, and supervision of each medical specialty.

HMOs, by their very nature, are somewhat exclusive. Every physician is not entitled to be included in every HMO. The various plans enhance competition because they offer a choice between groups of hospitals and physicians from which consumers can choose.

Petitioner's contention that Health First acted against its own self-interest in denying Petitioner membership is simply wrong. It made plain economic sense for Health First to adhere to its bylaws, and to follow its efficient credentialing procedure.

The district court found that Health First adopted its "ready made" credentialing procedure to avoid the cost of hiring a staff to screen applications. (A157.) The Eleventh Circuit, on *de novo* review, found that Health First adopted its credentialing process to avoid costs; a "legitimate business decision." (A13.) Both courts found no evidence of a conspiracy to keep Petitioner out of Health First (A13; A157), and both courts correctly found that Health First's admissions requirements did not unreasonably restrain trade. (A13; A162.)

### D. *PRC and Albert A. Post, M.D.*

Since 1975, PRC has provided radiological services to Sacred Heart pursuant to an exclusive written contract. PRC and Dr. Post, as Chairman of the Department of Radiology, were joined as defendants in this lawsuit

solely because of that exclusive contract. Petitioner claims she was denied staff privileges at Sacred Heart because of a conspiracy which included PRC and Dr. Post. The sole involvement of PRC and Dr. Post was to question how the Petitioner could have privileges in the Department of Radiology in light of the exclusive contract. (A137.) Petitioner has not challenged, and cannot challenge the validity of the exclusive contract. (A7; A127.) The record in this case shows there have been no actions taken by PRC and Dr. Post which affected the Petitioner's application for staff privileges at Sacred Heart. The district court and the court of appeals were correct in concluding that the ultimate credentialing decisions constituted unilateral actions taken by the Sacred Heart Board of Directors, and that such actions did not support a theory of antitrust conspiracy. (A9; A137.)

As to the alleged "community-wide" conspiracy, PRC and Dr. Post had no involvement with any decisions made by Health First. Petitioner makes the naked allegation of such a conspiracy without being able to point to any support in the record for her position. After a *de novo* review of the entire record, the Eleventh Circuit correctly agreed with the district court in finding there was "no evidence" that any of the Respondents conspired to keep Petitioner out of Health First. (A13.)

Petitioner claims she proved her community-wide conspiracy by showing the Respondents undertook parallel actions that made no economic sense. However, Petitioner failed to point out any actions taken by PRC or Dr. Post which failed to make economic sense. They engaged in no actions relaing to Health First. As to medical staff privileges at Sacred Heart, their only participation was limited to comments questioning whether it was appropriate to grant Petitioner privileges in the Department of Radiology in light of the exclusive contract. Entering into and upholding the valid exclusive contract

for radiological services was completely consistent with rational economic objectives. (A127.)

### E. *The Alleged "Community Wide" Conspiracy*

The courts below also examined the realities of the marketplace in Pensacola and found that, aside from Petitioner's claim of parallel denials of staff privileges (a claim that is insupportable since Baptist, unlike Sacred Heart, granted Williamson privileges), there was no evidence of an antitrust conspiracy to deprive Williamson of membership in Health First. Finding that, even without Williamson's inclusion in Health First, only a maximum of eight percent of potential patients in the Pensacola marketplace were excluded from choosing her services, both the district court and the Eleventh Circuit properly held that there was no antitrust injury.

## SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari, as well as the case from which it ensues, is the very embodiment of the warning that this Court has given in antitrust actions brought by competitors. Specifically, in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 891-92 (1993), this Court stated:

> The purpose of the [Sherman Act] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest . . . .

Petitioner, Angel Williamson, operates an extremely successful outpatient radiology clinic in Pensacola, Florida. Notwithstanding the substantial success of the Clinic, Petitioner brought an antitrust action against a number of competitors, chiefly alleging an antitrust conspiracy.

The Eleventh Circuit fully considered and correctly decided Petitioner's claims. At the outset, the Eleventh Circuit found that Petitioner had no standing to sue under the Sherman Act. Petitioner misleadingly and erroneously states that the court below based this finding on evidence that the Clinic had been profitable. (Petition at 24-26.) Contrary to this contention, however, the Eleventh Circuit decided Petitioner's lack of standing to sue based on the fact that Petitioner presented no evidence that the challenged conduct adversely affected competition in the form of higher prices or lower output. This finding does not, as Petitioner would lead this Court to believe, amount to requiring plaintiffs to be "bankrupt to successfully sue under the antitrust laws." (Petition at 26.) Instead, it is consistent with this Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), in which the Court defined "antitrust injury" (the first requirement of standing) as "reflect[ing] the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." The Eleventh Circuit correctly found that "[b]ecause there has been no harm to competition, there has been no antitrust injury, and consequently appellant lacks standing." (A7.)

The Eleventh Circuit then noted that even if Petitioner had standing to sue, Petitioner's conspiracy theory could not be reasonably supported by the evidence, and that, as a result, Petitioner had failed to raise a genuine issue of material fact to defeat Respondents' motions for summary judgment. The Eleventh Circuit did not, as Petitioner contends, "weigh competing evidence of defendants' motives." Instead, the Eleventh Circuit analyzed the factual context of Petitioner's claim to determine if it made "economic sense" as required under *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In so doing, the district court and the court of appeals found the undisputed fact that Williamson had never admitted patients to the other hospitals at

wnich she had privileges. Therefore, the Eleventh Circuit reasoned that Petitioner's theory—that, absent a conspiracy, Respondents had an economic incentive to grant her such privileges because she would admit patients—necessarily failed. The undisputed evidence that Petitioner had never admitted a patient to another hospital conclusively negated Petitioner's only inference of conspiracy. There was no factual support for Petitioner's claim of conspiracy whatsoever, let alone any "competing evidence" to be weighed. The Eleventh Circuit, in affirming Respondents' motions for summary judgment, correctly followed the parameters outlined by this Court in *Matsushita*.

When viewed in light of the record and the decision below, it is evident that this case is specific to these particular facts and presents no conflict with other decisions, and no significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10. Accordingly, the Petition should be denied.

## ARGUMENT—REASONS FOR DENYING CERTIORARI

### I. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT PETITIONER HAD NO STANDING TO SUE

The decision below affirming the grant of summary judgment did not turn on the resolution of any significant legal questions. Rather, the court of appeals carefully reviewed the routine issues of standing and the proper standard on a motion for summary judgment. The Eleventh Circuit's review was *de novo*, hence the court below made a thorough review of the facts and law in this case. First, the court of appeals addressed the question of Petitioner's standing. As the Eleventh Circuit correctly stated, standing to sue under the Sherman and Clayton Acts is a question of law. (A6.) Therefore, a court must determine if the plaintiff suffered antitrust injury. Here, Petitioner has offered no evidence of injury or restraint

of trade to the public detriment. Without these requisite elements, Petitioner's claim fails as a matter of law. Far from adequately explaining the argument, Petitioner baldly asserts that the court of appeals wrongly found that she had no standing to sue "because her clinic increased its profits during the course of this litigation." (Petition at 24.) In this regard, Petitioner is misleading, if not completely wrong. In its decision, the Eleventh Circuit stated that to suffer antitrust injury,

> [t]here must be a showing that the plaintiff's injury coincides with public detriment. Generally, this requires either a showing of higher prices or lower output. The record does not indicate a reduction in the output of outpatient radiological services in the Pensacola market.

(A6.)

Petitioner does not even attempt to contradict this finding. Instead, Petitioner argues that Sacret Heart and Baptist also enjoyed an increased share in the market and that she, therefore, should have done even better. This is clearly insufficient to grant standing and certainly not worthy of review by this Court.

## II. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THIS CASE DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED IN *MATSUSHITA ELECTRIC INDUSTRIAL CO. v. ZENITH RADIO CORP.*, NOR WITH ANY OTHER DECISION

Notwithstanding its determination that Petitioner had no standing, the Court below still went on to fully consider Petitioner's claims on the merits. In so doing, the Eleventh Circuit correctly applied this Court's standard as enunciated in *Matsushita*, 475 U.S. 574, for summary judgment in antitrust actions brought by competitors. Petitioner now argues that the Eleventh Circuit impermissibly

weighed competing evidence of Respondents' motives in that once Petitioner submitted evidence supporting a reasonable inference of conspiracy, it was the jury's province to weigh the evidence. Significantly, Petitioner ignores the Eleventh Circuit's critical finding that Petitioner failed to submit any probative evidence supporting an inference of conspiracy in the first instance. Consequently, the court of appeals' decision does not warrant this Court's attention because it was entirely consistent with *Matsushita*. Moreover, it presents no conflicts with other decisions of this Court, or with that of any other court of appeals.

In *Matsushita*, this Court held that to survive a motion for summary judgment, plaintiffs "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury." *Id.* at 585-86 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)). This Court went on to state that

> [i]t follows from these settled principles that if the factual context renders [plaintiff's] claims implausible —if the claim makes no economic sense—[plaintiff] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

*Id.* at 587.

Moreover, even though inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion, where conduct is "as consistent with permissible competition as with illegal conspiracy [it] does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)). To survive a motion for summary judgment, a plaintiff seeking damages for an antitrust violation "must present evidence 'that tends to exclude the possi-

bility' that the alleged conspirators acted independently." *Id.* (citing *Monsanto*, 465 U.S. at 764). Accordingly, the court below looked to the factual context of this case to determine whether Petitioner's claim, that there was parallel conduct by Respondents amounting to a "refusal to deal," made economic sense.

Significantly, the court below found that there was no parallel conduct in that Baptist, unlike Sacred Heart, granted Petitioner privileges. Not surprisingly, Petitioner fails to even mention this finding that is, in any event, fatal to Petitioner's community-wide conspiracy claim, the self-proclaimed "heart of the complaint." Then, viewing the facts in a light most favorable to Petitioner with respect to parallel conduct, the court below examined whether the alleged parallel "refusals to deal" made economic sense as required under *Matsushita*. In this regard, Petitioner had vigorously argued that Sacred Heart and Baptist had an economic incentive to grant Petitioner privileges in order to capture her hospital admissions patients. Yet, the *undisputed* evidence, found by both the district court and the court of appeals, was that Petitioner had never admitted patients to the hospitals where she already had privileges. Petitioner has not attempted to dispute, nor can she dispute, this critical fact. Consequently, if Petitioner had not admitted patients to hospitals where she already had privileges, the courts below reasoned that there was no economic reason for Sacred Heart or Baptist to grant her privileges. Further, both courts found that Sacred Heart and Baptist were in direct competition with Petitioner for clinic patients and that they had a rational economic reason for denying privileges to her. (A8; A11-12; A129-130; A154-155.)

Petitioner, in her "Questions Presented," characterizes the court of appeals' determination of economic sense as "weigh[ing] competing evidence on the defendants' motives." (Petition at (i).) Yet, this determination of "economic sense" with respect to Petitioner's theory is the pre-

cise teaching of *Matsushita* and its progeny, including the more recent decision of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992). Although this Court held in *Kodak* that summary judgment should have been denied by the district court, this Court reaffirmed its holding in *Matsushita* by stating, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.* at 2083. Thus, the courts below followed the instructions of this Court and determined that Petitioner's theory made no economic sense. Remarkably, Petitioner does not even argue with the merits of that determination itself, but instead, argues that the district court and court of appeals were wrong to have made the determination in the first place.

Respondents submit that the courts below need not have even reached that determination since it is undisputed that Respondents did not engage in parallel conduct. Having had the benefit of all inferences drawn in her favor to reach this level of analysis, Petitioner now complains it was ever reached at all.

Nor is the decision here in conflict with other circuits as Petitioner suggests. (Petition at 3-4, 17-24.) In each of the three decisions that Petitioner argues are in conflict, the courts of appeals still had to engage in an analysis of the "economic sense" of the plaintiff's claim.[6] In these cases, the particular factual context rendered the defendants' actions reasonable. These cases do not represent a legal conflict, but instead are controlled by distinguishing facts. Indeed, since this Court's holding in

[6] *Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 114 S. Ct. 554 (1993); *Big Apple BMW v. BMW of North America*, 974 F.2d 1358, (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *Arizona v. Standard Oil of California*, 903 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

*Matsushita*, federal courts of appeals have affirmed a lower court's grant of summary judgment (or partial summary judgment) for defendants in 35 antitrust cases involving challenges by physicians and other health care practitioners objecting to their exclusion from the staff of a hospital or the panel of a health care plan.[7]

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[7] *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994); *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682 (8th Cir. 1993); *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Marrese v. American Academy of Orthopaedic Surgeons*, 977 F.2d 585 (7th Cir. 1992); *Lie v. St. Joseph Hosp.*, 964 F.2d 567 (6th Cir. 1992); *Johnson v. Nyack Hosp.*, 964 F.2d 116 (2d Cir. 1992); *Clough v. Rush*, 959 F.2d 182 (10th Cir. 1992); *Mann v. Princeton Community Hosp. Ass'n.*, 956 F.2d 1162 (4th Cir. 1993); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388 (10th Cir. 1992), *aff'd*, 1 F.3d 1101 (1993); *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3057 (1992); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484 (9th Cir. 1991); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991); *Beard v. Parkview Hosp.*, 912 F.2d 138 (6th Cir. 1990); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *McKenzie v. Mercy Hosp.*, 854 F.2d 365 (10th Cir. 1988); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987); *Sarin v. Samaritan Health Ctr.*, 813 F.2d 755 (6th Cir. 1987); *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119 (7th Cir. 1986) (per curiam); *Coastal Neuro-Psychiatric Assocs., v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir. 1986); *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353 (5th Cir. 1986); *Miller v. Indiana Hosp.*, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1366 (1993); *Brown v. Our Lady of Lourdes Medical Ctr.*, 767 F. Supp. 618 (D.N.J. 1991), *aff'd*, 961 F.2d 207 (3d Cir. 1992); *Westchester Radiological*

Accordingly, the courts below were correct in concluding that Petitioner had not raised a genuine issue of material fact to defeat Respondents' summary judgment motions.

## CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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